challenge to the favor is allowed in a civil suit."

The juror in a challenge to the favor was examined on his *voir dire*. This is the usual way of determining all challenges. Now, triors being abolished, the only distinction between a principal challenge and a challenge to the favor is done away with; and it is respectfully submitted that the courts should cease to regard it.

In the principal case, the judge seeking to draw this subtle distinction has himself fallen into error; as that which he here adopts as a challenge to the favor is in the text-books set down as a principal challenge. See Proffatt 245.

The decision of the court in the principal case as to the eligibility of a juror who sat on a former trial, is somewhat similar to that in *Smith* v. *Wagonseller*, 21 Penna. 491, in which the court say: "that though it would be a good cause for challenge, that a person called as a juror had acted as such in another cause between the same parties, involving the same questions and determined on the same evidence, yet when the second case is to be submitted upon different ground, he is competent. It is not to be presumed that any intelligent juror would be affected by evidence given in a former cause but not offered in the one trying.'

Much more advanced ground is taken, however, in *Whitner* v. *Hamlin*, 12 Florida 18. There the court say, "that after a juror has been regularly sworn and impanelled, the fact he was a juror previously in the same cause, where there was a mis-trial, because the jury could not agree, does not authorize or require his being set aside in the second trial, when it does not appear that the juror is prejudiced, partial or biased in regard to the matter or question submitted to the jury, and this in the judgment or discretion of the court." So in *Atkinson* v. *Allen*, 12 Vt. 619: "The mere fact that a juryman sat in the case, on a former trial, or had *formed* an opinion, if he had not given a verdict, or in any other way *expressed* that opinion, constitutes no sufficient ground of challenge."

These last two cases appear to be entirely contrary to the current authorities. Thus, in *Spear* v. *Spear*, 1 Green 534: "Jurors who rendered a verdict against the defendants on an indictment, are not competent jurors in an action of trespass against the same defendants, involving the same questions and in relation to the same subject-matter; nor are they rendered competent by declaring upon their *voir dire* that they have not formed or expressed an opinion." So, also, *Southwaite* v. *Tatum*, 21 Ark. 336, and many others.

G. W. R.

United States Circuit Court, Southern District of New York.

CHRISTOPHER OSCANYAN *v.* THE WINCHESTER REPEATING ARMS COMPANY.

The rule that a public office is a public trust, and that all agreements by a person holding such a station to control the business of the government for a pecuniary consideration to himself, are void as against public policy, is not a local rule or peculiar to the law of this country, but a principle of morality and of public policy enforced in all countries having an organized system of law.

Such an agreement will not be enforced in the courts of this country though the plaintiff relying on it is an officer only of a foreign government, as to the law of which in regard to such matters there is no evidence.

The rule of public policy enforced in an action by a Turkish consul for commissions on a sale of fire-arms to another officer of the Turkish government.

An objection that a contract sought to be enforced in a court of justice is *contra bonos mores* cannot be waived by the failure of the defendant to make it. Whenever the fact appears the court will take notice and enforce it.

THIS was an action of assumpsit to recover from the defendant $136,000, commissions to the plaintiff for his services in effecting the sale of fire-arms to the Turkish government, amounting in all to $1,360,000.

The plaintiff's counsel, in his opening statement to the jury, stated the facts upon which he relied, which facts, it was conceded, the plaintiff offered to prove, and claimed to be true. Assuming such facts as true, the defendant moved according to the practice in this circuit, for a verdict for the defendant or for a dismissal of the suit, upon the ground that the plaintiff had no legal and valid cause of action, upon his own showing.

Hermon H. Shook, *Richard O'Gorman* and *Theodore W. Dwight*, for plaintiff.

E. R. Robinson and *F. N. Bangs*, for defendant.

The further facts appear in the opinion of

SHIPMAN, J.—The facts are as follows: The plaintiff, an Armenian Turk, who had long resided in this country, was consul-general for the Ottoman government in the city of New York. The office had no fixed salary, but the incumbent had the right to receive certain fees for clearances of Turkish vessels, or vessels bound for Turkey. The duties of the office were not stated, except so far as can be inferred from the title. It is certain, however, that the plaintiff was in some sort the representative of the Turkish government in this city, and was an acknowledged official of that empire. In 1869 the Turkish government sent Rustem Bey to this country to purchase arms and ammunition, or to examine various arms, and to report upon and recommend those which he should approve, to the proper authorities in Turkey. Rustem Bey did not speak the English language, but was acquainted with French. He was an old acquaintance of the plaintiff, and while in this city made the plaintiff's office his headquarters. As the plaintiff was well versed in the English language, all the business pertaining to the selection of arms was transacted by Rustem Bey through the plaintiff.

The defendant was and is a corporation established in Connecticut for the manufacture of fire-arms, of which corporation Mr. O. F. Winchester was at the time of these transactions the president. In 1870 the plaintiff and Mr. Winchester met, and the latter asked the plaintiff to call Rustem Bey's attention to the defendant's repeating rifle. The plaintiff replied that he had a commission on all business or sales which were effected through his instrumentality. Winchester replied, "We will make that right, and agree upon the amount," or words to that effect. The weapon was exhibited by Mr. Oscanyan to Rustem Bey, who did not like it. The plaintiff afterwards informed Mr. Winchester of this fact, but said that he thought he could induce Rustem Bey to include the Winchester arm among other samples which he was to forward to Turkey. This was done. On January 1st 1870, Rustem Bey received instructions from the sultan to examine and report upon the Spencer rifle, an arm which had been manufactured in this country. The reason for giving this order was, that the sultan had heard that a quantity of these guns were owned by and were to be sold by the United States government. The plaintiff thereupon used all his influence (which is represented to have been great), with Rustem Bey to have the Spencer gun discarded, and also used all his influence to have Rustem Bey examine the Winchester gun. The Turkish officer still did not like the arm; but finally the plaintiff succeeded in obtaining from him an order for a thousand guns. This order Rustem Bey gave in order to please the plaintiff, who, he knew, was getting a commission, and, furthermore, in his report condemned the Spencer gun.

Mr. Winchester and the plaintiff subsequently met, and Mr. Winchester was informed that the plaintiff had succeeded in getting the Spencer gun to be condemned, to which Winchester replied, "Why did you do that? I could have furnished you commissions upon sale of that gun." The plaintiff replied, "Why, the Turkish government would have bought of the United States government." The Turkish government thereafter invited proposals for the sale of twenty thousand Winchester rifles, and ordered fresh samples. Mr. Winchester was informed by the plaintiff of this direction, and that he had got an order for twenty thousand guns, and could get an order for one hundred thousand more.

An agreement, dated March 4th 1870, contained the following promise:

"I hereby promise to pay to you a commission of (10) ten per cent. upon all sales of the arms of our company made to, or by you, to the Ottoman government, provided only that such sale is made at prices and upon terms that shall first have our approbation or be authorized by us.

O. F. WINCHESTER,
President W. R. Arms Co.

P. S.—The commissions on the Spencer arms will be the same as on our arms."

After some delays from various causes, in November 1870, a written contract was entered into by the defendant with the Turkish government for arms to the amount of $520,000, and on August 19th 1871, another contract was entered into for the purchase of arms from the defendant to the amount of $840,000.

The plaintiff claims that the procuring cause of these contracts was the recommendation of Rustem Bey, which recommendation was obtained from him through the influence of the plaintiff.

The defendant's counsel now moves for a verdict upon the ground that the alleged contract with the plaintiff for the payment of commissions to him upon sales made to the government of which he was an officer and trusted adviser, by the exercise and through the means of his great influence with the purchasing agent of that government, is void, as being a contract which is corrupt in itself, and which is prohibited by morality and public policy.

The character of the services which the plaintiff rendered, and the source or cause of their efficiency in obtaining for this arm the favor of Rustem Bey, and the large orders of the Turkish government, have been so boldly and clearly stated by the plaintiff's counsel, that the case is freed from all disguise. The contract between the plaintiff and the defendant was a purchase and sale of the plaintiff's official influence as an officer of the Turkish government, and as the manager of the business transactions of Rustem Bey with the American manufacturers, and the purchase and sale of the personal influence of the plaintiff over Rustem Bey, who was a stranger to our language and upon our soil, and the transaction was an active and controlling exercise of the influence for the benefit of the defendant, in causing the rejection of arms the purchase of which, it was supposed, would not accrue to the defendant's benefit, and in causing the purchase of the defendant's arms by the Turkish government.

The plaintiff states, through his counsel, that he caused the rejection of the Spencer rifle, which the sultan was disposed to look upon with favor, because the plaintiff supposed that the purchase of this arm would be of no pecuniary benefit to the defendant, and that he caused the purchase of the Winchester rifle to an immense amount, because he was thereby hoping to earn large commissions, and because such a purchase would accrue greatly to the benefit of the defendant. The benefit which would accrue to the government of which he was the commercial representative in this city, does not seem to have entered into the considerations which influenced his mind. It is true that the plaintiff was not the purchasing agent of the Turkish government, but he was its agent, and one upon whom the purchasing agent relied. He was a public officer of the government of Turkey. In delivering the opinion of the Supreme Court in *Trist* v. *Child*, 21 Wall. 441, Mr. Justice SWAYNE remarks: "The theory of our government is that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice and the public good. They are never to descend to a lower plane." I am not aware that Turkey has laid down any different rule for the guidance of the persons whom it has charged with the exercise of public trusts upon foreign soil.

It is virtually conceded that if such a contract had been entered into by an official of the United States in regard to commissions upon the sale of supplies, which might be effected through his influence or exertions with our own government, whether that official was the purchasing agent or not, such a contract would be against public policy. The concession of the counsel is also found in the opinion in *Tool Company* v. *Norris*, 2 Wall. 45, in which Mr. Justice FIELD, says: "All agreements for pecuniary considerations to control the business operation of the government * * * are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country." But it is said that this is the law to be observed by public officers in this country, and to be administered by the courts of this country, and that it does not follow that it is a rule which is to be enforced by our courts upon foreign officers in regard to their dealings with foreign governments. The

principle to which I have adverted in regard to contracts for the use of official influence, is not found in a local statute; it is not peculiar to this country; it is a principle of morality and of public policy, enforced in all countries which have a thoroughly organized system of law, and there is no presumption that it is contrary to the law of Turkey.

Again, the contract was entered into in this city by a resident of this city, with a citizen of Connecticut. "Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance:" *Scudder* v. *Union National Bank*, 1 Otto 406.

Furthermore, it is sought to be enforced in our courts. Not only is it true that such a contract is against public policy, but its enforcement by a court of justice is against public policy. Quoting again from the opinion of Mr. Justice SWAYNE, in *Trist* v. *Child*: "It is a rule of the common law of universal application, that where a contract, express or implied, is tainted with either of the vices last named" (*i. e.* because it is contrary to a constitution or statute or inconsistent with sound policy or good morals) "as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."

It is not material that the plaintiff was permitted to enter into mercantile business by his government, nor is it material that his office was not a salaried one, or that Rustem Bey was aware that the plaintiff was acting in the expectation of commissions. Rustem Bey was not authorized to condone any acts of the plaintiff. Neither do I think it important that the Turkish government was aware that the plaintiff was in the receipt of commissions; for, as has been said, the courts of this country are not organized to enforce contracts, which are repugnant to the principle upon which courts are founded.

It is strongly urged by the plaintiff that since the passage of the act known as the Practice Act, approved June 1st 1872, 17 Stat. at Large, p. 197, and embodied in sections 914, 915 and 917 of the Revised Statutes of the United States, the pleadings in civil causes in the Circuit and District Courts must conform as near as may be to the pleadings existing at the time in like causes in the courts of record of the state within such Circuit or

District Court is held, and that by the Code of Procedure of the state of New York, the answer must set out specifically the grounds of defence which are relied upon, and that illegality of consideration must be specially set forth and that the alleged invalidity of this contract is exclusively a matter of defence, and if neglected or waived by the defendant, is not to be regarded by this court. The plea in this case, being the general issue, was filed at the October Term 1874.

Prior to the Act of June 1st 1872, the common-law system of process and pleadings existed in this court, and immediately thereafter, as a matter of fact, the system was not substantially and materially changed. Common-law declarations were filed, and if no objection was made thereto, the pleadings thereafter were conducted under the established common-law rules. No authoritative decision was rendered discountenancing such system of pleading, until the case of *Lewis* v. *Gould*, decided in December 1875.

The present case was originally brought in a state court, and was commenced by complaint. After it was removed to this court a new declaration in assumpsit was filed, in accordance with the existing usage, and the plea of the general issue was filed. In the case of *Lewis* v. *Gould*, 13 Blatchf. C. C. 216, it was held that "the common-law forms of pleading are no longer necessary in the United States courts within the state of New York, nor are they admissible except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the state as to pleadings." And in *Bills* v. *Railroad Co.*, 13 Blatchf. C. C. 227, it was also held that when a complaint had been put in in the state court, and the action had been removed to this court, no further pleadings on the part of the plaintiff were necessary. At common law, prior to the new English rules passed about the year 1833, the defendant could, under the general issue in an action of assumpsit, safely rely upon the defence that the contract which was sued upon was illegal in its inception: 1 Chitty on Pleading 476, 477; Gould's Pleadings 330, 332; Stephen on Pleading 162, note; *Young* v. *Black*, 7 Cranch 565; *Craig* v. *Missouri*, 4 Peters 410; *Andrews* v. *Pond*, 13 Id. 65; *Wilt* v. *Ogden*, 13 Johns. 56; *Edson* v. *Weston*, 7 Cowen 278; *Young* v. *Rummell*, 2 Hill 478. If, under the decision of *Lewis* v. *Gould*, it should now be held that the general issue was inadmissible, or, if admissible, it did not permit the special matter of defence which is relied upon, yet the

defendant, having pleaded without objection under a system which was recognised as proper at the time when the plea was filed, should have the right to amend his plea, so as to have the benefit of a defence which goes to the merits, and is not merely technical in its character.

But the question in regard to the disposition of this case does not depend upon rules of pleading. The plaintiff, in his opening statement, stated the facts which he claimed to be true, and upon which he should rely. It is not suggested that they were not stated truthfully. These facts satisfy me that the contract was *contra bonos mores*. Such an objection it is not possible for the defendant to waive. If he undertakes to waive or to disregard it, the duty of the court is still imperative not to enforce a contract which the law regards as injurious to public morals and against public policy. Courts are not open for the enforcement of such contracts, and will not lend assistance for the recovery of claims founded thereon, and it is immaterial whether the defendant has or has not formally taken the objection. "The defence is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. When the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation:" *Coppell* v. *Hall*, 7 Wall. 542.

Recurring now to the character of the contract, there is no conflict in regard to the important facts. Upon a given and ascertained state of facts, the validity or invalidity of a contract is a question of law. There is nothing for the jury to pass upon. Upon the validity of this contract I do not think that there is a discrepancy between the law as expounded by the Court of Appeals of New York, and by the United States Supreme Court. The cases of *Lyon* v. *Mitchell*, 36 N. Y. 235, 682, and *Cummins* v. *Barkalow*,

4 Keyes 514, are very far from validating such an agreement as is here sued upon.

In view of the decision in *Tool Co.* v. *Norris*, 2 Wall. 45, it is not important to ascertain what the precise duties of Mr. Oscanyan, as consul-general, were. By virtue of his office, and by virtue of his position as an officer of the Turkish government here, and through his acquaintance with Rustem Bey, the plaintiff held close and confidential relations with this gentleman. He had an influence over him, and was trusted and esteemed by him. The plaintiff is now seeking to obtain payment for the exercise of his influence over a purchasing agent, which resulted in procuring a contract to furnish supplies to the government of which both were officers at the time of such contract. An agreement to pay for such services being void, the plaintiff has no cause of action, and the motion of the defendant is granted.

Supreme Court of Indiana.

SAMUEL AYRES ET AL. *v.* DAVID HAYS ET AL.

Where a purchaser of land finds a mortgage satisfied of record and on the faith of that record and without actual notice of any mistake, pays his money, he takes a title clear of the mortgage although it turns out that the entry of satisfaction was a mistake which would be rectified between the parties.

THIS was a proceeding in the court below, by Samuel Ayres and others, against the appellees, Michael George, David Hays and Joseph Butcher, to foreclose a mortgage. The complaint alleged that on the 22d of February 1873, the said Michael George executed his two promissory notes for $500 each, to one Joseph C. Campbell, one payable one year, and the other two years after date.

That on the same day the said George also executed to the said Campbell a mortgage on several tracts of land in Monroe county, to secure the payment of said notes, which mortgage was duly recorded in said Monroe county.

That on the 15th day of April 1873, the said Campbell assigned the note first due to the plaintiffs. That after said last-named note had been assigned to the plaintiffs, and after said mortgage had been so recorded, to wit, on the 7th day of August 1873, the said George conveyed a portion of the mortgaged lands to the defend-